IN THE

Supreme Court of the United States

October Term, 1960

No. 500

ROBERT G. THOMPSON,

Appellant,

v.

SUMNER G. WHITTIER, Administrator of Veterans' Affairs,

Appellee.

On Appeal from the United States District Court for the District of Columbia

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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The Court Has Jurisdiction to Entertain the Appeal

This Court's jurisdiction to entertain the appeal herein, pursuant to 28 U. S. C. 1253, turns on whether the case is one required under 28 U. S. C. 2282 to be heard initially by a three-judge district court. Appellee urges in his Motion to Dismiss that the case is not required to be heard initially by a three-judge court and cites, as controlling, this Court's decision in *Flemming* v. *Nestor*, 363 U. S. 603. We urge

here that *Flemming* v. *Nestor* is distinguishable from the case at bar and is not controlling, and that this case is one required under 28 U. S. C. 2282 to be heard initially by a three-judge court.

A. *Flemming* v. *Nestor* is distinguishable from the case at bar and is not controlling.

Flemming v. *Nestor*, *supra*, is distinguishable from the case at bar in vital respects. In that case, although the constitutionality of the statute was drawn in question, plaintiff did not seek affirmatively to interdict the operation of a statutory scheme. The suit was one for statutory review and no declaratory judgment or injunctive relief was sought.

In the case at bar appellant does not merely draw the constitutionality of the Forfeiture Statute in question, rather he seeks affirmatively to interdict its enforcement and operation. The suit is for a declaratory judgment and injunctive relief. It seeks a declaration that the Forfeiture Statute is unconstitutional and it seeks injunctive relief coercing the Administrator of Veterans' Affairs, appellee herein, to make payment to appellant of service-connected disability compensation due at the time of the commencement of the suit and to become due (R. 1-4). Thus, unlike *Flemming* v. *Nestor*, judgment for appellant, here, would put the operation and enforcement of the Forfeiture Statute under the restraint of an equity decree.

B. The case is one required to be heard initially under 28 U. S. C. 2282 by a three-judge court.

An action for a declaration of the unconstitutionality of a federal statute is required to be heard initially by a three-judge court. For, such a declaration of rights "would be in effect a decision upon the constitutionality of a federal statute, having the same force and effect as an injunction

* * *." *United States* v. *149 Gift Packages*, 52 F. Supp. 993, 995 (E. D. N. Y. 1943); see also *Rolls-Royce* v. *Stimson*, 56 F. Supp. 22, 23 (D. C. D. C., 1944). Declaratory judgments are not mere advisory opinions, and 28 U. S. C. 2202 envisages the transformation of a declaratory judgment into a compulsory one. Here appellant has combined in his request for a declaratory judgment a request also for injunctive relief.

In addition, the relief sought in the case at bar comes within the scope of 28 U. S. C. 2282 as construed by this Court. The complaint alleges that "one of the purposes of this action is to enjoin the enforcement and execution of certain acts of Congress for repugnance to the Constitution" (R. 1). Although the prayer for relief does not in terms expressly pray for an order enjoining the operation and enforcement of the Forfeiture Statute, in effect it does precisely that. For it requests an affirmative declaration of the unconstitutionality of the Forfeiture Statute and a coercive order requiring appellant to refrain from giving effect to the statute by ordering it to pay to appellant compensation due him and to become due in the future.*

To confer jurisdiction on a three-judge court under 28 U. S. C. 2282, it is not necessary, as appellee appears to urge, that the relief requested be stated in express terms of enjoining the operation and enforcement of a federal statute (Motion to Dismiss, p. 8). It is the effect of the judgment sought which is controlling. *Lambert Run Coal*

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* In any event, the prayer for relief is not controlling in determining the relief to which the suitor is entitled. *Kansas City, St. L. & C. R. Co.* v. *Alton R. Co.*, 124 F. 2d 780 (C. C. A. 7, 1941). It is the pleadings taken as a whole which is decisive. Rule 8(f) of the Federal Rules of Civil Procedure; *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197, 200. And the allegations in the complaint, including the purpose of the suit alleged therein, as well as the prayer for relief, plainly show that appellant seeks affirmatively to interdict the operation and enforcement of the Forfeiture Statute.

Co. v. *Baltimore & Ohio Railroad Co.*, 258 U. S. 377; *Coffman* v. *Breeze Corporations*, 323 U. S. 316; *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U. S. 977.

In *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad Co.*, *supra*, the plaintiff instituted suit in a state court to enjoin defendant, a private corporation, from applying certain rules pursuant to which defendant refused to furnish cars in accordance with established ratings and to require defendant to furnish such cars. Defendant removed the suit to the federal district court alleging as a defense that the rules were those promulgated by the Interstate Commerce Commission pursuant to an Act of Congress. Plaintiff then moved in the district court for an interlocutory injunction against defendant. Defendant moved to dismiss on the grounds that the proceeding was in effect one to stay an order of the Commission and that accordingly a three-judge court was required to hear the case. Defendant's motion was denied by the District Court. The Court of Appeals reversed the District Court, holding that the case was one for a three-judge court. This Court, in affirming, held (*supra* at 381-382):

> The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was *in effect* sought. The Appellate Court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three judges. (Emphasis supplied.)

Coffman v. *Breeze Corporations*, *supra*, involved an action to enjoin defendants, as licensees of plaintiff's patent, from paying accrued royalties to the Government, as required under an Act of Congress. The complaint attacked the constitutionality of the Act and the United States was

permitted to intervene. A court of three judges was convened to hear the case. This Court held (*supra*, note 1, pp. 317-318):

> The District Court of three judges was rightly convened, although the suit was brought against private parties, not public offers. * * *
>
> Here the injunction sought would restrain appellee from payment of the royalties into the Treasury as required by the Act of Congress and would thus restrain the 'operation' or 'execution' of the statute.*

In *Federal Housing Administration* v. *The Darlington, Inc.*, *supra*, the Federal Housing Commission attempted to force respondent, owner of an apartment project, to cease and desist from certain rental practices forbidden by an Act of Congress. Respondent, contending that the Act of Congress, if so construed, was repugnant to the Constitution, instituted suit for a declaratory judgment as to its rights to engage in such practices and for an injunction restraining defendant from interfering with its operation of the apartment project. The District Judge before whom the case was pending requested that a three-judge court be convened. The three-judge court held that the complaint did not set forth a cause of action required to be initially heard by a three-judge court (*The Darlington, Inc.* v. *Federal Housing Administration*, 134 F. Supp. 337). Thereafter a single judge heard the case and held the statute unconstitutional (142 F. Supp. 341). On direct appeal, this Court reversed the judgment and remanded the case for consideration by a three-judge district court, although the

* The holding that the case was required to be heard by a three-judge court and that this Court had jurisdiction to entertain the appeal was made despite the fact that the Court held on the merits that the complaint failed to state a cause of action in equity or to present a justiciable controversy.

complaint did not in express terms request an injunction restraining the enforcement of an Act of Congress for repugnance to the Constitution.

In no one of the cases discussed above did the plaintiff seek in express terms to restrain the operation or enforcement of an Act of Congress. In each case this Court looked to the effect of the relief sought in determining the applicability, under 28 U. S. C. 2282, of the requirement of a three-judge court.

Appellant's contention as to the applicability of 28 U. S. C. 2282 to the case at bar does not rest, as appellee urges, on the "long range effect of a court's decision" (Motion to Dismiss, p. 9). In the first place it rests on the fact that appellant expressly stated that the purpose of the suit was to restrain the operation and enforcement of the Forfeiture Statute. In the second place it is not the long range effect of a "*decision*" which is here involved, rather it is the immediate effect of the *relief sought*, as framed by the nature of the suit and the complaint. And the immediate effect of the relief sought as framed by the nature of the suit and the complaint is to affirmatively interdict the operation and enforcement of the Forfeiture Statute.*

For the reasons discussed above the case was required to be heard initially by a three-judge court. Hence, this Court has jurisdiction under 28 U. S. C. 1253 to entertain the appeal.

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* Appellant's object was not merely to seek review of the Administrator's action. This is clear from the nature of the remedy he sought, namely, the remedy of the declaratory judgment and injunctive relief. And it is in connection with that remedy that the applicability of 28 U. S. C. 2282 must be considered. In *Hecht v. Nestor*, *supra*, Nestor did not seek that remedy.

CONCLUSION

The motion to dismiss should be denied and probable jurisdiction should be noted.

Respectfully submitted,

MARY M. KAUFMAN,
Attorney for Appellant.

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* Appellee concedes that the case presents substantial issues which warrant plenary consideration by an appellate court (Motion to Dismiss, p. 6).